

1  
2 \*E-FILED 7/17/2008\*  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES *ex rel.* DONNA M.  
McLEAN and THE STATE OF CALIFORNIA  
*ex rel* DONNA M. McLEAN,

No. C05-01962 HRL

Plaintiffs,

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO COMPEL EXPERT  
DISCLOSURES OR FOR SANCTIONS**

v.

THE COUNTY OF SANTA CLARA, THE  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES OF SANTA CLARA  
COUNTY, KENNETH BORELLI,  
LAWRENCE GALLEGOS, EPIFANIO ("J.R.")  
REYNA, TANYA BEYERS, DR. DEE  
SCHAFFER, DR. TOMMIJEAN THOMAS,  
DR. RICHARD PERILLO and DOES 1-100,

**[Re: Docket No. 168]**

Defendants.

/

Defendants move for an order compelling relator Donna McLean to provide proper expert disclosures under Fed. R. Civ. P. 26(a) and extending the time for expert discovery. Alternatively, pursuant to Fed. R. Civ. P. 37(c)(1), they seek an order precluding her from presenting any expert testimony at trial. McLean opposes the motion. Upon consideration of the moving and responding papers, as well as the arguments presented at the June 24, 2008 hearing, this court grants the motion to compel. The court does not reach defendants' alternate motion for evidentiary sanctions.

1        In this qui tam action, McLean claims that defendants have invented fictional children  
2 for the purpose of overbilling the state and federal governments in connection with requests for  
3 reimbursement for child welfare expenditures. The United States and the State of California  
4 declined to intervene in this action. The state qui tam claims brought on behalf of the State of  
5 California have been voluntarily dismissed without prejudice.

6        Pursuant to this court's scheduling order, expert disclosures were due by April 15, 2008.  
7 On that date, McLean served a document titled "Further Rule 26 Disclosure Including  
8 Disclosure of Expert Witnesses." In it, she lists 67 "persons whom she expects to use at trial to  
9 present evidence under Federal Rules of Evidence, Rules 702, 703, or 705." (Kiniyalots Decl.,  
10 Ex. A at 1:22-24). The list includes McLean, her current and former attorneys (including her  
11 former and current counsel in the instant action), judges, police officers, school counselors,  
12 therapists, nuns, as well as attorneys at the U.S. Attorney's Office, the U.S. Department of  
13 Justice and the California Attorney General's Office who are monitoring these proceedings.  
14 Appended to the list are various documents, including police reports, therapy reports and  
15 transcripts of testimony from other legal proceedings.

16        Defendants argue that McLean's disclosure fails to disclose how the listed individuals  
17 could be considered "experts" and which (if any) of them are retained. They further contend  
18 that the disclosure is inadequate because (a) no written reports were provided and (b) the  
19 disclosure itself does not provide sufficient information for defendants to determine what  
20 testimony these individuals might offer and whether any testimony is cumulative or relevant.

21        McLean maintains that her disclosure complies with Fed. R. Civ. P. 26 because it  
22 identifies everyone known to her who, based upon their education, training and experience, may  
23 be called to provide expert opinions as to the issues in dispute. For example, she asserts that the  
24 identified police officers have expertise in police County policies in removing children from  
25 their homes; the nuns may testify about children and maintaining an intact family unit; and  
26 McLean's counsel have knowledge as to the reasonableness of any attorney's fees to which  
27 McLean may be entitled. Although she expects to compensate some witnesses for their time,  
28 McLean advises that none of the listed individuals have been specially retained to provide

1 expert testimony. As such, she argues that no written reports are required under Fed. R. Civ. P.  
2 26. She contends that she has gone beyond the requirements of Fed. R. Civ. P. 26 by providing  
3 police and therapy reports and prior testimony of some of these unretained witnesses.

4 Under Fed. R. Civ. P. 26(a)(2), a party is required to disclose all experts – retained and  
5 unretained – whom it may use at trial to present testimony under Fed. R. Evid. 702, 703, or 705.  
6 FED. R. CIV. P. 26(a)(2)(A). “Unless otherwise stipulated or ordered by the court,” a written  
7 report is required only as to witnesses who are “retained or specially employed to provide  
8 expert testimony in the case or . . . whose duties as the party’s employee regularly involve  
9 giving expert testimony.” FED. R. CIV. P. 26(a)(2)(B).

10 This court finds that McLean’s disclosure was not based on a good-faith attempt to  
11 meaningfully identify persons who may be used to offer expert opinions at trial. Instead, it  
12 appears that the disclosure was created out of McLean’s concern about the then-impending  
13 close of discovery and is the result of her effort to identify every person she could think of who  
14 had any involvement in her prior lawsuits against the County or any possible connection  
15 (however slight) to the instant action. As noted above, although the document purports to list  
16 everyone who might offer expert testimony, the title of the document itself suggests that expert  
17 witnesses comprise only a subset of the proffered list.

18 Moreover, the principle aim of the expert disclosure requirements is to give opposing  
19 parties a “reasonable opportunity to prepare for effective cross examination and perhaps arrange  
20 for expert testimony from other witnesses.” FED. R. CIV. P. 26 advisory committee’s note  
21 (1993). McLean’s disclosure fails to provide defendants with a sufficient basis by which to  
22 make an informed decision as to who should be deposed and how to otherwise prepare their  
23 defense. Nor is this court persuaded that any prejudice to defendants is minimized (or  
24 eliminated entirely) because the disclosed individuals reportedly were employed, deposed,  
25 interviewed, or otherwise involved in prior adverse litigation with the County of Santa Clara.  
26 Based upon the record presented, it is not clear what specialized knowledge (if any) the listed  
27 persons have that may bear upon the matters in dispute here.

28

1 || Accordingly, IT IS ORDERED THAT:

2           1. Defendants' motion to compel is GRANTED as follows: No later than **August**  
3           **8, 2008**, McLean shall serve an expert disclosure which clearly identifies any unretained experts  
4           whom she may use to provide testimony under Fed. R. Evid. 702, 703 or 705. At that time, and  
5           for each such identified witness, McLean shall make a proffer as to what each witness will say,  
6           the bases for the opinions to be expressed, and the methodology they used to reach their  
7           conclusions, which the court may then use to determine whether and when further proceedings  
8           are required under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); see Fed.  
9           R. Evid. 702.

10           Insofar as McLean says that the various attorneys listed in her April 15, 2008 disclosure  
11 were identified solely for their reported knowledge and experience as to any attorney's fees  
12 which she might claim, she need not make a proffer as to them at this time.

13 2. Expert discovery, which closed on June 16, 2008, is re-opened as follows:

14                   a. Defendants shall have until **September 8, 2008** to designate any rebuttal  
15 experts with reports.

16                   b. Defendants shall have until **October 8, 2008** to complete discovery as to  
17                   any experts identified by plaintiff.

18 3. The court does not reach defendants' alternate motion for evidentiary sanctions.

20 || Dated: July 17, 2008

  
HOWARD R. LLOYD  
UNITED STATES MAGISTRATE JUDGE

1 **5:05-cv-1962 Notice has been electronically mailed to:**  
2 Virginia Stewart Alspaugh Virginia\_Alspaugh@cmwlaw.net, Linda\_Knobbe@cmwlaw.net,  
3 TheAlspaughs@cox.net  
4 Orley Brandt Caudill , Jr brandt\_caudill@cmwlaw.net, christopher\_zopatti@cmwlaw.net  
5 William C. Dresser loofwcd@aol.com  
6 Melissa R. Kiniyalocots melissa.kiniyalocots@cco.co.scl.ca.us  
7 Donna M McLean loofwcd@aol.com  
8 Sara McLean sara.mclean@usdoj.gov  
9 Richard Augustus Swenson rsloofwcd@aol.com  
10 Joan Eve Trimble joan\_trimble@cmwlaw.net, patricia\_inabnet@cmwlaw.net  
11 Sara Winslow sara.winslow@usdoj.gov, kathy.terry@usdoj.gov  
12 **Counsel are responsible for distributing a copy of this document to co-counsel who have  
not registered for e-filing under the court's CM/ECF program.**  
13

14 **Notice mailed to:**

15 Julia Ann Clayton  
16 California Attorney General's Office  
17 455 Golden Gate Avenue, # 11000  
18 San Francisco, CA 94102-7004  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28